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In the Supreme Court of the United States

OCTOBER TERM, 1976

NICHOLAS B. STEPHENS, PETITIONER

v.

UNITED STATES OF AMERICA

ERNEST D. BRACKEEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,

RICHARD L. THORNBURGH,
Assistant Attorney General,

JEROME M. FEIT,
VICTOR D. STONE,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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OPINION BELOW

The court of appeals rendered no opinion.

JURISDICTION

The judgment of the court of appeals was entered on April 22, 1976. Petitioner Brackeen's petition (No. 75-6809) was not filed until May 24, 1976, and is therefore out of time under Rule 22(2) of the Rules of this Court. Petitioner Stephens' petition for rehearing was denied on June 8, 1976. His petition for a writ of certiorari (No. 76-109) was filed on July 7, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioners have standing to object to the search at an airport freight depot of two foot lockers containing marijuana that were addressed to

another person, when the search was made three days before petitioners were arrested and charged with taking possession of the marijuana in another state, and, if they have standing, whether there were exigent circumstances justifying the search.

2. Whether, in instructing the jury about petitioner Brackeen's alleged possession of marijuana with intent to distribute, the trial court erred in refusing to charge that simple possession of narcotics was, on this record, a lesser included offense.

3. Whether the trial court properly rejected petitioner Brackeen's claim that his in-court identification was irreparably tainted.

STATEMENT

After a jury trial in the United States District Court for the Middle District of Tennessee, petitioners were convicted of possessing 187 kilos of marijuana with intent to distribute, in violation of 21 U.S.C. 841(a)(1). They were both provisionally sentenced to five years' imprisonment pending a sentencing study pursuant to 18 U.S.C. 4208(b). The court of appeals affirmed in a brief order (Stephens Pet. 2a-3a).

1. On three occasions in the fall of 1974, James Parker, Jr., who testified for the government, was employed by petitioner Stephens as a courier at $500 per trip to carry suitcases filled with marijuana from Edward Kelly of San Diego, California, to petitioner Stephens in Nashville, Tennessee, and then to return to San Diego with ten or eleven thousand dollars (Tr. 157-159). On the first trip, Parker was accompanied by petitioner Stephens from Nashville to San Diego (Tr. 158). At the time, petitioner Stephens purchased some small trunks (Tr. 144, 145, 158). On another occasion, Parker observed some of these small trunks

in petitioner Stephen's apartment in Hendersonville, Tennessee (Tr. 145, 161). Parker later met petitioner Brackeen at Stephens' apartment (Tr. 160-162).

On the third trip, Parker flew from San Diego to Chattanooga where, after his arrival, he and petitioner Brackeen cut the marijuana up and re-packaged it into bags (Tr. 164). Petitioner Brackeen then drove Parker and petitioner Stephens to Brackeen's apartment in Murfreesboro, where Brackeen left some of the marijuana (Tr. 165). Brackeen then drove Parker and Stephens to the latter's apartment, where the rest of the marijuana was unloaded. It was later moved out of the apartment (Tr. 165). At that time, petitioner Stephens told Parker that Stephens was going to start sending the marijuana in trunks without a courier in order to reduce expenses (Tr. 166).

2. Thereafter, at about 5:30 a.m. on Saturday, December 21, 1974, airline employees at the San Diego International Airport, who were loading baggage onto a pre-Christmas freight flight to Dallas, Texas, summoned local police officers to investigate two trunks which smelled like narcotics (Tr. 7; Suppression Hearing ("Supp. Tr.") 4-5, 33, 34). By 6:30 a.m., two police officers had carried the trunks inside an airplane hangar and identified a strong odor of a bulk quantity of marijuana emanating therefrom (Tr. 8; Supp. Tr. 6, 51). The airline employees informed the officers that the shipper of the trunks had specifically requested that the trunks leave on the 7:40 a.m. flight to Dallas and that in order to accomplish that goal, the trunks would have to be loaded in a short time (Supp. Tr. 8, 51-53).

The officers, who testified that it would have taken at least three hours to get a telephonic search warrant on that Saturday morning (Supp. Tr. 6-7), decided to search the trunks without delay in order to try to

"put [the trunks] back on the same flight as if nothing had happened out of the normal as far as shipping time" (Supp. Tr. 52). By 6:45 a.m., the police officers had opened the locked trunks, removed one kilo of marijuana from each of the trunks, which contained a total of eighty-nine kilos of marijuana, and returned the trunks to the freight area fifty-five minutes before the 7:40 a.m. departure time (Tr. 8, 15; Supp. Tr. 27-28). Shortly after the search the police officers learned that the trunks would not be shipped until a later flight because of the heavy volume of pre-Christmas mail (Supp. Tr. 33-34).

On December 22, 1974, the trunks arrived at the Nashville airport (Tr. 19-20). At 4:55 p.m. on December 24, 1974, a woman called to verify that the trunks, destined for Ronnie Harper, Route 4, Springfield, Tennessee, had arrived (Tr. 9, 25, 42). At about 6:00 p.m., petitioner Brackeen came to collect the two trunks. He was arrested after he had signed a receipt for the trunks with the name "Ronnie Harper" and had loaded the trunks into the back of his pickup truck (Tr. 25-26, 38, 48).

Shortly thereafter, Brackeen decided to cooperate with the arresting officers (Tr. 29). Each trunk was emptied of all but one package of marijuana and reloaded into petitioner Brackeen's pickup truck (Tr. 64). On the way to petitioner Stephens' apartment in Hendersonville, petitioner Brackeen told one of the police officers that "the marijuana was not all his [and] that he didn't feel like he should take the whole rap * * * " (Tr. 107).

After setting up surveillance at the apartment complex where petitioner Stephens lived, the officers observed both petitioners emerge from the building. As petitioner Stephens shook one of the trunks in the back of the

truck, the officers arrested him (Tr. 109-110, 117). Petitioner Stephens then shouted to a woman standing at the entrance to the apartment complex, "Run. It's the police" (Tr. 110-112, 119). The woman was not apprehended. The door to Stephens' apartment was ajar and inside the officers found additional trunks, two packages of barbiturate pills and about one ounce of marijuana—or nearly twice as much marijuana as the amount state law allowed for personal use (Tr. 114-116, 122, 140-141).

ARGUMENT

1. (a) The indictment charged petitioners with possession of marijuana with intent to distribute on or about the day they took possession of the two foot lockers, December 24, 1974. As the court of appeals correctly held, neither petitioner has standing to contest the search of the two trunks at the San Diego International Airport three days earlier, on December 21, 1974. At that time, the trunks were addressed to a third person, the search occurred out of petitioners' presence, on premises in which they had no proprietary interest, and petitioners' possession of the seized evidence at the time of the search was not an essential element of the offense charged. Under *Brown* v. *United States*, 411 U.S. 223, 228-229, they therefore lacked standing.

Despite the government's objection to petitioners' standing to object to this search (Supp. Rec. on Appeal, Item No. 34), neither petitioner offered any evidence at the suppression hearing or at trial to show that they, rather than, for example, their San Diego supplier, Edward Kelly, had a possessory interest in the trunks at the time of the search. Petitioner Stephens now asserts, however, that the government presented unrefuted testimony that he was in all likelihood responsible for the trunks being in San Diego and that the govern-

ment's case thus conferred standing upon him to contest the search in San Diego (Stephens Pet. 12).

The government's evidence, however, showed only that several months earlier petitioner Stephens had purchased other smaller trunks. The mere "likelihood" that petitioner Stephens or petitioner Brackeen or Edward Kelly or addressee Ronnie Harper may have owned the trunks is not sufficient to give petitioners standing to contest the search. As this Court stated in *Brown* v. *United States*, *supra*, 411 U.S. at 228-229, "petitioners in this case could have asserted, at the pretrial suppression hearing, a possessory interest in the goods * * * without any danger of incriminating themselves. They did not do so. * * * Petitioners * * * failed to allege any legitimate interest of any kind in * * * the merchandise seized."

(b) Even if petitioners have standing to contest the warrantless search of the trunks, the search was justified by exigent circumstances.

Petitioner Brackeen complains that the one hour and ten minutes between the discovery by the police officers of the strong odor of marijuana emanating from the trunks at 6:30 a.m., and the departure of the Dallas flight at 7:40 a.m., was sufficient time to get a warrant, and that in any event the officers should have detained the trunks until the next flight while they obtained a warrant. But the officers were informed that the shipper had given specific instructions that the trunks were to be shipped on the 7:40 a.m. flight. Failure to accomplish that goal, which required almost immediate loading of the trunks, might have exposed the police surveillance and jeopardized the attempt to apprehend the intended recipients of the marijuana. In these exigent circumstances, where there was almost no time to get a warrant or to delay shipment of the trunks, the immediate

execution of the search was reasonable. See *United States* v. *Valen*, 479 F. 2d 467, 471 (C.A. 3), certiorari denied, 419 U.S. 901; *Clayton* v. *United States*, 413 F. 2d 297, 298 (C.A. 9, 1969).[1] After the search was made, and the trunks were put back into their place in the stream of outgoing freight, they nevertheless missed the 7:40 a.m. flight; but this did not render unreasonable the police officers' prior determination that an immediate search was warranted in the circumstances.

2. Petitioner Brackeen contends that the trial court improperly refused to instruct the jury that they could find him guilty of the lesser-included-offense of simple possession of narcotics. He argues that the evidence offered at trial would permit a jury rationally to conclude that he had no intent to distribute eighty-seven kilos of marijuana but rather that he intended to keep it for his own personal use.[2]

Petitioner Brackeen offered no evidence on this issue at trial and the uncontradicted evidence offered by the government showed that petitioner Brackeen admitted that the bulk quantity of marijuana of which he took delivery "was not all his" (Tr. 107). In addition, there was evidence that petitioner Brackeen had previously

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[1]Since there were exigent circumstances for the search of the trunks, there is no reason for the Court to hold this case pending the disposition of the government's petition for certiorari in *United States* v. *Chadwick*, No. 75-1721, where the government has argued that even in the absence of exigent circumstances, such trunks—by their very nature—are subject to an immediate search.

[2]Petitioner's oral request for this instruction was denied on the ground that the indictment charged possession of a "controlled substance," not "narcotics" (Tr. 200-201). Even if the language of the requested instruction had been amended, however, there was no evidence to support it.

helped petitioner Stephens receive and "cut" for redistribution other commercial quantities of marijuana. In these circumstances, where there was no evidence which could rationally support a jury finding that petitioner possessed the eighty-seven kilos of marijuana for his own personal consumption, the district court correctly refused to instruct the jury on the offense of simple possession. *Keeble* v. *United States*, 412 U.S. 205, 208; *Sansone* v. *United States*, 380 U.S. 343, 354-355.

3. Petitioner Brackeen further contends that the trial court erred when it refused to strike an in-court identification of him by government witness Parker. Petitioner Brackeen asserts that Parker's reliability had been irreparably tainted on the day prior to trial when Parker was shown and identified a photograph of Brackeen.

The evidence at trial showed that Parker had dealt with Brackeen while making two marijuana deliveries to petitioner Stephens. On the first occasion, Parker saw Brackeen in Stephens' apartment handling several pounds of the marijuana which Parker had just delivered and which were "ready to go on the street" (Tr. 153). On the second occasion, Brackeen and Parker together cut up and repackaged a commercial quantity of marijuana and then Brackeen drove Parker from Chattanooga to Hendersonville.

On the day prior to trial, Parker identified Brackeen's photograph, stating that "it was [petitioner Brackeen] with his beard shaved off" (Tr. 178). Subsequently, Parker identified Brackeen at trial (Tr. 146, 162, 180).

This is not a case where a witness is relying upon a fleeting glance to identify an otherwise unknown suspect.[3] Here Parker was identifying a person with whom he

[3]There is thus no occasion to defer disposition here pending the outcome in *Manson* v. *Brathwaite*, No. 75-871, certiorari granted, May 3, 1976, which involves the effect of impermissibly suggestive out-of-court and in-court identification procedures.

had spent a considerable amount of time while engaged in illegal activities. Moreover, there was ample other evidence at trial which corroborated Parker's identification of Brackeen as a business associate of Stephens.

CONCLUSION

It is therefore respectfully submitted that the petitions for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

RICHARD L. THORNBURGH,
Assistant Attorney General.

JEROME M. FEIT,
VICTOR D. STONE,
Attorneys.

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